Michael Lee @ Weng Onn Lee v Public Prosecutor

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPLICATION NO 44–45 OF 1998
KC VOHRAH J
30 OCTOBER 1998

Criminal Procedure *— Bail — Granting of — Extradition proceedings — Two unsuccessful applications for bail in sessions court — Application to High Court — Whether High Court should consider whether offences have been made out for extradition — Whether there should be separate bail application upon applicant's remand for extradition*

Criminal Procedure *— Bail — Non-bailable offence — Applicant accused of committing 42 offences in Australia and convicted for two offences in Malaysia — Applicant remanded pending extradition proceedings — Whether there is likelihood of applicant absconding — Whether bail should be granted*

This was an application by one Michael Lee @ Weng Onn Lee ('the applicant') for bail, pending his extradition proceedings. The applicant was arrested on 9 February 1998. The proceedings were commenced in the Kuala Lumpur Sessions Court on 20 February 1998 and would be continued on 2 November 1998. The applicant had earlier made two unsuccessful applications in the sessions court and subsequently, one in the High Court No 2. In the present application, the applicant pointed out four material changes in circumstances relating to his re-application for bail for the court to consider. They were, namely: (i) there had been a long delay in the proceedings before the sessions court, therefore, if the applicant was remanded to custody, the ensuing proceedings to secure his discharge in the High Court, Court of Appeal and the Federal Court, if considered necessary to pursue in this courts, would mean that the applicant would be in custody for several years; (ii) that even if the applicant were to be extradited to Australia and was convicted on the abetment offences, he would not face higher sentences than those imposed on the principal, but the delay in the extradition proceedings here would mean that the applicant, if convicted, would in effect serve a longer period of sentence; (iii) that the wife of the applicant who was running a bona fide business was having difficulty with the business because of the absence of the applicant; and (iv) that the applicant hada joint venture with a German firm to market some of its products and if he did not deal with the German firm, it would be a lost opportunity.

Held, dismissing the application:

(1) It was not for this court, when considering the issue of whether bail was to be granted, to delve into the sufficiency or admissibility of evidence and the law as to whether the offences had been made out for the purpose of extradition. That would be a matter for the sessions court, seized of the proceedings relating to the extradition, to decide. If the extradition proceedings resulted in

the applicant being remanded, then a separate bail application would have to be made for his release pending judicial review of the remand order made (see pp 176I and 177A, D).

(2) It would be presumptuous for the court to speculate on what an Australian court would do. In any event, one could not say with certainty that the same judge who convicted the principal would try the offences against the applicant. Nevertheless, the reasons advanced as constituting a change in the circumstances had to be viewed in the broader context, ie whether there was a likelihood of the applicant absconding if released on bail. Bearing in mind the nature of the 42 offences for which the applicant was wanted in Australia and the fact that the earlier High Court had rejected his application for bail, the likelihood that he would abscond was justifiable (see pp 177F, H–I and 178A–B).

Obiter:

An application for bail can be made to the High Court in the event of an unsuccessful application in any subordinate court without resorting to an appeal against such refusal. There can be a renewed application for bail provided that the consideration of the court on the reapplication should touch on a material change of circumstances and not circumstances which were considered in the application before (see p 175D–F).

[Bahasa Malaysia summary

Ini adalah satu permohonan oleh Michael Lee @ Weng Onn Lee ('pemohon') untuk ikat jamin, sementara menunggu prosiding penyerahan baliknya. Pemohon telah ditangkap pada 9 Februari 1998. Prosiding telah dimulakan di Mahkamah Sesyen Kuala Lumpur pada 20 Februari 1998 dan akan bersambung semula pada 2 November 1998. Pemohon sebelum itu telah gagal di dalam dua permohonan di mahkamah sesyen dan kemudiannya di Mahkamah Tinggi No 2. Di dalam permohonan ini, pemohon telah menunjukkan empat perubahan yang material dalam hal keadaan permohonan semula ikat jaminnya untuk ditimbangkan oleh mahkamah. Perubahan-perubahan tersebut adalah: (i) telah berlakunya penangguhan prosiding di mahkamah sesyen yang begitu lama, oleh kerana itu, jika pemohon diletakkan di bawah tahanan, prosiding-prosiding berikut bagi menentukan pembebasannya di Mahkamah Tinggi, Mahkamah Rayuan dan Mahkamah Persekutuan, jika perlu, akan bermakna pemohon akan berada di dalam tahanan untuk beberapa tahun; (ii) bahawa sekalipun pemohon diserah balik ke Australia dan disabitkan atas kesalahan-kesalahan persubahatan, dia tidak akan dijatuhkan hukuman yang lebih tinggi daripada apa yang dijatuhkan ke atas pesalah utama, tetapi penangguhan prosiding di sini akan bermakna pemohon, jika disabitkan, akan menjalankan

A hukuman yang lebih lama tempohnya; (iii) bahawa isteri pemohon yang menjalankan sebuah perniagaan yang bona fide sedang menghadapi masalah dengan perniagaannya itu disebabkan ketiadaan pemohon; dan (iv) bahawa pemohon mempunyai satu usahasama dengan sebuah firma Jerman untuk memasarkan sebilangan keluaran mereka dan jika pemohon tidak dapat berurusan dengan firma Jerman
B itu, peluang tersebut akan hilang begitu sahaja.

Diputuskan, menolak permohonan:

(1) Adalah bukan menjadi tugas mahkamah ini, apabila menimbangkan isu sama ada ikat jamin harus diberikan atau
C tidak, untuk menyelidiki kecukupan atau kebolehterimaan keterangan dan undang-undang berkenaan sama ada kesalahan-kesalahan tersebut telah dibuktikan bagi tujuan penyerahan balik. Perkara tersebut adalah bagi mahkamah sesyen untuk menentukannya. Jika prosiding penyerahan balik itu
D menyebabkan pemohon ditahan, satu permohonan ikat jamin yang berasingan hendaklah dibuat bagi tujuan pembebasannya sementara menunggu kajian semula kehakiman terhadap perintah tahanan yang telah dibuat itu (lihat ms 176I dan 177A, D).

(2) Ia adalah satu tindakan yang memandai-mandai untuk
E mahkamah membuat spekulasi tentang apa yang akan dilakukan oleh mahkamah Australia. Walau apa sekalipun, seseorang tidak boleh mengatakan dengan penuh keyakinan bahawa hakim yang sama yang menyabit si prinsipal akan juga mengadili perbicaraan kes pemohon. Walau bagaimanapun, alasan-alasan yang dikemukakan bagi menunjukkan adanya perubahan di dalam hal
F keadaan hendaklah dilihat di dalam konteks yang lebih luas, iaitu sama ada terdapatnya kemungkinan pemohon melarikan diri jika dibebaskan atas ikat jamin. Dengan mengambil kira sifat 42 kesalahan yang mana pemohon dikehendaki di Australia dan hakikat di mana Mahkamah Tinggi yang terawalnya telah menolak permohonannya untuk ikat jamin, kemungkinan
G pemohon melarikan diri adalah berjustifikasi (lihat ms 177F, H–I dan 178A–B).

Obiter:

H Suatu permohonan bagi ikat jamin boleh dibuat kepada Mahkamah Tinggi, tanpa melalui proses rayuan, sekiranya permohonan tersebut telah gagal di mana-mana mahkamah rendah. Suatu permohonan baru untuk ikat jamin boleh dilakukan dengan syarat perkara yang perlu dipertimbangkan oleh mahkamah ke atas permohonan semula itu hendaklah menyentuh perubahan yang material dalam hal keadaan
I dan bukannya hal keadaan yang telah dipertimbangkan di dalam permohonan yang terdahulunya (lihat ms 175D–F).]

Notes

For cases on non-bailable offence, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 560–579.

For cases on granting of bail, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 544–558.

Cases referred to

Mohamed Razip & Ors v PP [1988] 1 MLJ 84 (refd)
PP v Sanyasaya [1925] Mad 1224 (refd)
R v Phillips (1922) 128 LT 113 (refd)
Sek Kon Kim v A-G [1984] 1 MLJ 60 (refd)
Sulaiman bin Kadir v PP [1976] 2 MLJ 37 (refd)

Legislation referred to

Commonwealth Crimes Act 1914 ss 5, 29D, 71, 76C, 86A [Aust]
Criminal Procedure Code (FMS Cap 6) ss 387, 388, 389
Extradition Act 1992 ss 2, 3, 44,
Fugitive Criminals Act 1967 s 23
Passports Act 1966 s 12(1)(c), (d), (2)
Passport Act 1938 s 10 [Aust]

Muhamad Shafee Abdullah (*Ng Aik Guan* with him) (*Shafee & Co*) for the applicant.

Abang Iskandar bin Abang Hashim (Deputy Public Prosecutor) for the respondent.

KC Vohrah J:

There is no order published under s 2 of the Extradition Act 1992 ('the Act') relating to any binding arrangement between Malaysia and Australia for the extradition of fugitive criminals. However, the Minister of Home Affairs, acting under s 3 of the Act, has directed that the provisions of the Act to be applied to Weng Onn Lee, also known as Michael Lee alias Lee Ba Ba, Lee Cheng Eng, Lee Michael and Marzuqi Lee Abdullah (the applicant in this application) as if there is force in respect of Australia, an order under s 2 of the Act. The special direction was made after Australia had made a request for the extradition of the applicant, accused of the commission of 42 offences in Australia.

The applicant was arrested on 9 February 1998 on a warrant of apprehension issued by a Kuala Lumpur first class magistrate.

Extradition proceedings against the man were commenced in the Kuala Lumpur Sessions Court on 20 February 1998 and the continued hearing of the proceedings is scheduled to start on 2 November 1998.

The man has applied for bail in this court. He had earlier made two unsuccessful applications in the sessions court for bail and on 23 April 1998, he was again unsuccessful in his application for bail, this time in the High Court, Court 2.

A There is no specific provision in the Act for a court to grant bail. Although there is no specific provision as in s 23 of the Fugitive Criminals Act 1967 (with which the Extradition Ordinance was repealed by the Act) stating that the provisions of the Criminal Procedure Code (FMS Cap 6) ('the CPC') relating to bail shall apply in the same manner as they would apply if such person was accused of committing in Malaysia the offence of B which he is accused or has been convicted (see its application in *Sek Kon Kim v A-G* [1984] 1 MLJ 60 at p 61), there is a provision under s 44 of the Act which states that the provisions in the CPC in relation to matters not covered by the Act shall apply in so far as they are not inconsistent with the provisions of the Act. With this provision, the provisions relating to bail in C Ch XXXVIII of the CPC are imported into the Act, provided the provisions are not inconsistent with the Act. The provisions of s 387 relating to bailable offences and s 388 relating to non-bailable offences have pertinence in this matter. I shall revert to these two provisions later.

As stated earlier, two unsuccessful applications for bail were pursued in the sessions court and before the application for bail in this court, there was D an application in High Court No 2 for bail which was turned down. An application for bail can be made to the High Court in any event of an unsuccessful application in any subordinate court, without resort to an appeal to the High Court against the refusal to give bail (see s 389 of the CPC and *Sulaiman bin Kadir v PP* [1976] 2 MLJ 37).

E There is persuasive authority (see the Singapore case of *Mohamed Razip & Ors v PP* [1988] 1 MLJ 84) and it is a prevailing practice that there can be renewed application for bail in the High Court, provided that the consideration of the court on the reapplication for bail should touch on a material change of circumstances and not circumstances which were considered in the application before the earlier court, as to do that would F surely be to constitute the later court of co-ordinate jurisdiction as an appellate court.

I have to consider whether there is a material change in the circumstances in the extant application. I have had a look at the previous application, Criminal Application No 44–26–98, which was supported by G one affidavit. I have also had the benefit of reading the notes of proceedings made available to me by the honourable judge in that case and what appears is that the court, in dismissing the application for bail on 24 April 1988, went on the basis of the deputy public prosecutor's submission that the 42 offences with which the accused was charged are non-bailable offences. The court found that there was nothing, by way of material, to consider about H the character, means and standing of the applicant (relying on the case of *Sek Kon Kim*) and that the applicant was holding on to his passport and 'an offence (was) alleged to have been committed'. The court also stated that on the principles of *R v Phillips* (1922) 128 LT 113, there was an added ingredient to honour an obligation to hand over the applicant.

I I would think, therefore, that this court in considering this bail application, should not reopen arguments on *R v Phillips*, nor should the court reconsider arguments relating to the applicant having been convicted

in the Kuala Lumpur Magistrate's Court on 25 February 1998 for committing, on 14 January 1998, not one but two offences under the Passports Act 1966. It is not a matter of an offence alleged to have been committed but there is concrete proof that the applicant has two previous convictions on two offences, thus, the charges for which read:

> Pertuduhan pertama
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> Bahawa kamu pada 14 January 1998 jam lebih kurang 11 pagi di kaunter No 6 Bahagian Paspot Malaysia Pejabat Imigresen Wilayah Persekutuan Cawangan Damansara Kuala Lumpur telah cuba membuat permohonan pasport Malaysia di atas Borang No D 359746 dengan niat untuk mendapatkan bagi diri kamu suatu pasport dengan mengemukakan dokumen dan kenyataan palsu. Dengan yang demikian kamu telah didapati melakukan satu kesalahan di bawah s 12(1)(c) Akta Paspot 1966 dan boleh dihukum di bawah s 12(2) Akta yang sama.
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> Pertuduhan kedua
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> Bahawa kamu pada 14 January 1998 jam lebih kurang 11 pagi di kaunter No 6 Bahagian Paspot Malaysia Pejabat Imigresen Wilayah Persekutuan Cawangan Damansara Kuala Lumpur telah didapati dalam milikan kamu pasport Malaysia No A 8582589 yang diperolehi setelah membuat kenyataan dan mengemukakan bukti yang palsu. Dengan yang demikian kamu telah didapati melakukan satu kesalahan di bawah s 12(1)(d) Akta Paspot 1966 dan boleh dihukum di bawah s 12(1) Akta yang sama.

This court should also assume that for the purposes of this bail application, the earlier High Court had rejected bail after considering that the equipollent Malaysian offences are non-bailable. The applicant is accused of the commission of 42 offences in Australia namely:

(a) aiding, abetting, counselling or procuring the commission of an offence of intentionally and without lawful excuse, inserting dates into a Commonwealth computer, contrary to ss 5 and 76C of the Crimes Act 1914 (Cth) (18 counts);

(b) aiding, abetting, counselling or procuring the commission of an offence of defrauding the Commonwealth, contrary to ss 5 and 29D of the Crimes Act 1914 (Cth) (6 counts);

(c) aiding, abetting, counselling or procuring the commission of an offence of making a false statement for the purpose of obtaining an Australian passport, contrary to s 5 of the Crimes Act 1914 (Cth) and s 10 of the Passport Act 1938 (Cth) (16 counts);

(d) receiving property belonging to the Commonwealth, knowing the property to have been fraudulently misappropriated, contrary to s 71 of the Crimes Act 1914 (Cth) (1 count); and

(e) conspiracy to defraud the Commonwealth, contrary to s 86A of the Crimes Act 1914 (Cth) (1 count)

within the jurisdiction of Australia.

It is not for this court, when considering the issue of whether bail is to be granted, to delve into the sufficiency or admissibility of evidence and the law as to whether the offences have been made out for the purpose of extradition

A (see eg *PP v Sanyasaya* [1925] Mad 1224 at p 1225 in regard to this principle in bail applications generally); that would be a matter for the sessions court, seized of the proceedings relating to the extradition, to decide.

For this court, the material change in the circumstances have been B argued to be these:

(1) There has been a long delay in the proceedings before the sessions court which started on 20 February 1998. The proceedings are to continue in November 1998. The argument is that if the applicant is remanded to custody, the ensuing proceedings to secure his discharge in the High Court, Court of Appeal and the Federal Court, if C considered necessary to pursue in these courts, would mean that the applicant will be in custody for several years.

It is on record that the proceedings will be held soon. If the extradition proceedings result in the accused being remanded, then a separate bail application will have to be made for his release pending judicial review of D the remand order made.

(2) That even if the applicant were to be extradited to Australia and he is convicted on the abetment offences, he will not face higher sentences than those imposed on the principal, one Ahmad Duval, on the offences as was indicated by the judge who sentenced the principal to E three years and four months, in spite of the number of offences. The delay in the extradition proceedings here amounting to about eight months would mean that the applicant, if convicted, would in effect serve a longer period of sentence.

It would be presumptuous for this court to speculate on what an Australian F court would do. In any event, one cannot say with certainty that the same judge who convicted Ahmad Duval would try the offences against the applicant.

(3) That the wife of the applicant who is running a bona fide business is having difficulty with the business because of the absence of the G applicant since he is on remand.

(4) That the applicant has a joint venture with a German firm to market some of its products in neighbouring countries. If he does not deal with the German firm, it will be a lost opportunity.

With respect, the last two reasons advanced are not really on firm ground. H I cannot see them as reflecting his good character, means and standing. In any event, the last four matters advanced as constituting a change in the circumstances have to be viewed in the broader context; whether there is a likelihood of him, absconding, if released on bail. I do not see any material changes in the circumstances to grant bail. I have to bear in mind the nature of the 42 offences for which he is wanted in Australia — most of which I involve some element of fraud having been alleged as having been perpetrated. I have to particularly bear in mind the 16 counts that he faces of an offence for aiding, abetting, counselling or procuring the commission

of an offence of making a false statement for the purpose of obtaining an Australian passport, contrary to s 5 of the Australian Commonwealth Crimes Act 1914 and s 10 of the Passport Act 1938 and the fact that in the application for bail, the earlier High Court had rejected bail, one of the grounds being his alleged conviction for an offence (and it turns out that actually he was convicted on two offences) under the Malaysian Passports Act 1966. The likelihood that he will abscond is justifiable. The application for bail is rejected.

Application dismissed.

Reported by Mohd Rizal Abidin